Hock Huat Iron Foundry (suing as a firm) v Naga Tembaga Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEALS NOS P-02-56 AND P-02-708 OF 1996
NH CHAN, ABDUL MALEK AHMAD AND MOKHTAR SIDIN JJCA
21 JANUARY 1998

Contract *— Breach — Time of the essence — Building contract — Plaintiff failed to complete within agreed completion date — Defendant did not rescind contract but allowed plaintiff to continue — Whether time was essence of contract — Whether compensation payable*

Contract *— Building contract — Variations in the work — Plaintiff claimed for additional works on variation orders — Pleaded in statement of claim but not prayers — Whether trial judge was wrong in granting additional variation amount*

Contract *— Damages — Nominal damages — Counterclaim by defendant for liquidated damages and loss of income and interest on investment — Failure to prove amount — Whether trial judge was correct in awarding RM10 nominal damages*

The plaintiff (the appellant in the first appeal and the respondent in the second appeal) had sued the defendant (the respondent in the first appeal and the appellant in the second appeal) for RM356,833.54, pursuant to an agreement for the construction of an office and a factory. The agreed completion date was 30 November 1980 but the work was actually completed on 24 September 1981 and the defendant averred that the plaintiff was liable to pay liquidated damages. The plaintiff pleaded in its statement of claim that it had carried out additional works based on various variation orders at the defendant's request at the value of RM67,337.96, although this was not included in the prayers. The defendant insisted that the plaintiff was not entitled to the principal amount claimed as it had failed to complete the construction of the office and factory premises within the stipulated time. The defendant counterclaimed for RM594,308.45 as liquidated damages and RM618,986.28 as loss of interest on project investment and loss of income from investment by virtue of the plaintiff's delay in completing the works only after the specified contractual dates.

The trial judge gave judgment for the plaintiff but also allowed part of the defendant's counterclaim. He concluded that from the evidence and the surrounding circumstances of the case, the times of completion specified in the contract were of the essence of the contract. However, the plaintiff pleaded that even though time is of the essence of the contract, the defendant had allowed the completion dates to pass and acquiesced in the works continuing under the agreement. Further, the trial judge concluded that the defendant's loss had not been sufficiently proven and gave judgment for RM10 as nominal damages for the loss of interest on project investment and loss of income on investment.

Held, allowing the first appeal, dismissing the cross-appeal on nominal damages and allowing the second appeal:

(1) (Per **NH Chan** and **Abdul Malek Ahmad JJCA**) Since the defendant did not rescind the contract when the plaintiff failed to complete and even allowed the plaintiff to remedy his default by permitting him to continue to work on the project until it was wholly completed, time was no longer to be regarded as of the essence of the contract. The trial judge was wrong in giving judgment for the plaintiff because if time is of the essence and there is no rescission under s 56(1) of the Act, there will be no compensation. Compensation is payable for the delay when time is not of the essence (see pp 73F and 87B–C).

(2) (Per **NH Chan JCA**) When time is no longer of the essence of the contract and no time for performance is specified, s 47 allows the promise to be performed within a reasonable time. If there has been unnecessary delay by one party, the other may give him a notice fixing a reasonable time at the expiration of which he will treat the contract as at an end. In the present case, the defendant did not give notice of its intention to give up the contract if the plaintiff failed to complete at the time specified in the notice (see pp 73G and 74F).

(3) (Per **Abdul Malek Ahmad JCA**) When damage is shown but the amount is not proved, the court will usually award nominal damages. The trial judge was correct in concluding that the loss had not been proved sufficiently by the defendant and was right in giving judgment for RM10 as nominal damages for the loss of interest on project investment and loss of income on investment (see p 85E–F).

(4) (Per **Abdul Malek Ahmad JCA**) The trial judge was wrong in granting the order for the additional variation amount. The judgment should only be for the amount claimed and not together with the variation amount which was not claimed. Since the variation amount included in the amount claimed was RM67,337.96 and the trial judge had accepted the variation amount of RM62,608.98, the judgment sum was reduced from RM356,833.54 to RM352,104.56 (see p 87G–I).

[Bahasa Malaysia summary

Plaintif (yang merupakan perayu dalam rayuan pertama dan penentang dalam rayuan kedua) telah mendakwa defendan (penentang dalam rayuan pertama dan perayu dalam rayuan kedua) untuk RM356,833.54, menurut satu perjanjian untuk membina sebuah pejabat dan sebuah kilang. Tarikh penyiapan yang dipersetujui adalah 30 November 1980 tetapi kerja itu telah sebenarnya disiapkan pada 24 November 1981 dan defendan menegaskan bahawa plaintif bertanggungan untuk membayar ganti rugi jumlah tertentu. Plaintif

telah memplid dalam pernyataan tuntutannya bahawa ia telah menjalankan kerja-kerja tambahan berdasarkan pelbagai tempahan kerja atas permintaan defendan pada nilai RM67,337.96, walaupun perkara ini tidak dimasukkan dalam pohonan-pohonan tersebut. Defendan mendesak bahawa plaintif tidak berhak kepada jumlah prinsipal yang dituntut kerana ia telah gagal untuk menyiapkan pembinaan premis pejabat dan kilang tersebut dalam tempoh yang ditetapkan. Defendan telah menuntut balas sebanyak RM594,308.45 sebagai ganti rugi jumlah tertentu dan RM618,986.28 sebagai kerugian faedah atas pelaburan projek dan kehilangan pendapatan daripada pelaburan disebabkan oleh kelewatan plaintif dalam menyiapkan kerja-kerja tersebut yang siap hanya selepas tarikh-tarikh kontraktual yang ditentukan.

Hakim perbicaraan telah memberikan penghakiman kepada plaintif tetapi juga telah membenarkan sebahagian daripada tuntutan balas defendan. Beliau memutuskan bahawa daripada keterangan dan keadaan-keadaan yang mengeliling kes tersebut, masa untuk penyiapan yang ditetapkan dalam kontrak tersebut adalah merupakan intipati kontrak itu. Walau bagaimanapun, plaintif telah memplid bahawa sungguhpun masa merupakan intipati kontrak itu, defendan telah membenarkan tarikh-tarikh penyiapan berlalu dan bersetuju membenarkan kerja-kerja itu diteruskan di bawah perjanjian tersebut. Selanjutnya, hakim perbicaraan telah memutuskan bahawa kerugian defendan telah tidak dibuktikan dengan secukupnya dan memberikan penghakiman bagi RM10 sebagai ganti rugi nominal kerugian faedah di atas pelaburan projek dan kehilangan pendapatan di atas pelaburan.

Diputuskan, membenarkan rayuan pertama, menolak rayuan balas atas ganti rugi nominal dan membenarkan rayuan kedua:

(1) (Oleh **NH Chan** dan **Abdul Malek Ahmad HHMR**) Oleh kerana defendan tidak membatalkan kontrak apabila plaintif gagal untuk menyiapkan dan malahan telah membenarkan plaintif untuk meremedikan kemungkirannya dengan membenarkan beliau meneruskan kerja-kerja projek tersebut sehingga siap sepenuhnya, masa tidak lagi dianggap sebagai intipati kontrak tersebut. Hakim perbicaraan adalah salah dalam memberikan penghakiman untuk plaintif kerana jika masa adalah intipati dan tiada pembatalan di bawah s 56(1) Akta tersebut, tidak akan terdapat pampasan. Pampasan kena dibayar untuk kelewatan apabila masa bukannya intipati (lihat ms 73F dan 87B–C).

(2) (Oleh **NH Chan HMR**) Apabila masa tidak lagi menjadi intipati kontrak dan masa untuk pelaksanaan tidak ditetapkan, s 47 membenarkan janji tersebut dilaksanakan dalam tempoh masa yang munasabah. Jika terdapatnya kelewatan yang tidak wajar oleh sesuatu pihak, pihak yang lain boleh memberikannya notis yang menetapkan masa yang munasabah, yang mana atas perluputan masa ini beliau akan menganggap kontrak tersebut

sebagai telah tamat. Dalam kes ini, defendan telah tidak memberikan notis mengenai hasratnya untuk melepaskan kontrak tersebut sekiranya plaintif gagal untuk menyiapkannya pada masa yang ditentukan dalam notis tersebut (lihat ms 73G dan 74F).

(3) (Oleh **Abdul Malek Ahmad HMR**) Apabila kerosakan ditunjukkan tetapi jumlahnya tidak terbukti, mahkamah lazimnya akan memberikan ganti rugi yang nominal. Hakim perbicaraan adalah betul dalam memutuskan bahawa kerugian tersebut telah tidak dibuktikan secukupnya oleh defendan dan adalah betul dalam memberikan penghakiman sebanyak RM10 sebagai ganti rugi nominal untuk kerugian faedah di atas pelaburan projek dan kerugian pendapatan atas pelaburan (lihat ms 85E–F).

(4) (Oleh **Abdul Malek Ahmad HMR**) Hakim perbicaraan terkhilaf dalam memberikan perintah untuk jumlah perubahan tambahan. Penghakiman seharusnya hanya untuk jumlah yang dituntut dan bukan bersama-sama dengan jumlah perubahan yang tidak dituntut. Oleh kerana jumlah perubahan termasuk dalam jumlah yang dituntut adalah RM67,337.96 dan hakim perbicaraan telah menerima tuntutan jumlah perubahan sebanyak RM62,608.98, jumlah penghakiman tersebut adalah kini dikurangkan daripada RM356,833.54 kepada RM352,104.56 (lihat ms 87G–I).]

Notes

For cases on time of the essence, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1680–1683.

For cases on variations in the work, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1813–1814.

For cases on nominal damages, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2023–2024.

Cases referred to

Barclay v Messenger (1874) 43 LJ Ch 449 (refd)

Bonham-Carter v Hyde Park Hotel Ltd 64 TLR 177 (refd)

Buckland & Ors v Farmer & Moody [1978] 3 All ER 929 (refd)

Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd [1915] AC 79 (refd)

Jamshed Khodaram Irani v Burjori Dhunjibhai (1915) 32 TLR 156 (refd)

Loke Yuen Cheng & Anor v Vimtex Sdn Bhd [1998] 4 MLJ 169 (refd)

Luck v White (1973) 26 P & CR 89 (refd)

Malaysia Rubber Development Corp Bhd v Glove Seal Sdn Bhd [1994] 3 MLJ 569 (refd)

Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360 (refd)

Siah Kwee Mow & Anor v Kulim Rubber Plantations Ltd [1979] 2 MLJ 190 (refd)

Smith v Hamilton [1951] Ch 174 (refd)
Stickney v Keeble & Anor [1915] AC 386 (refd)
Webb v Hughes (1870) LR 10 Eq 281 (refd)

Legislation referred to

Contracts Act 1950 ss 47, 56(1), (2), (3), 65, 66, 75

Appeal from: Civil Suit No 776 of 1983 (High Court, Pulau Pinang)

Mohideen Abdul Kader (*Tan Boon Hee* and *Tung Mun Yeong* with him) (*Tan Ewe & Associates*) for the appellant in the first appeal and the respondent in the second appeal.

Jacqueline Christie (*Andrew Saw* with her) (*Ng Yook Woon Andrew TC Saw & Co*) for the respondent in the first appeal and the appellant in the second appeal.

5 November 1998

NH Chan JCA: I have had the advantage of reading the judgment in draft of Abdul Malek Ahmad JCA and I agree with all that he has said. However (and this is done in support of and also as an addition (for the sake of clarity only) to his Lordship's judgment), I wish to elaborate on the law applicable to the plaintiff's appeal (Civil Appeal No P–02–56–96) against the award for liquidated damages by the judge below on the defendant's counterclaim.

The judge below found that the intention of the parties was that time was of the essence of the contract. This is what he said:

> The next question I have to consider is whether the completion dates as stipulated in AB32 and AB34 are the essence of the contract. This is a question of law where several authorities were cited by both counsel in their written submissions. The defendants contend that it is 'yes', whereas the plaintiff says 'no'. In the defence to the counterclaim, he alleges a defence of waiver and acquiescence on the part of the defendants. From the authorities, it is quite clear to me that whether or not time is of the essence of the agreement depends on the facts and circumstances of each case. Intention of the parties gathered from the instrument itself together with the surrounding circumstance must be looked at (*Associated Pan Malaysia Cement Sdn Bhd v Syarikat Teknikal & Kejuruteraan Sdn Bhd* [1990] 3 MLJ 287). The evidence of the defendants' architect, DW4, and Yap, DW5, clearly show that they had explained to PW1 the contents of the agreement AB31–32 and the letter AB33 and 34, especially the completion dates. DW1 has also testified that in his meeting with the plaintiff before AB31–32 was signed, he stipulated the dates of completion which the plaintiff agreed. He explained to the plaintiff the essence of completing the works within the time stipulated and the bonus incentive. He also stressed that in the event of any delay by the plaintiff, the latter would have to pay liquidated damages as per tender document which was in his possession. In the face of the above explanations, it is not reasonable for PW1 to say that the dates referred to in those documents are merely tentative dates of completion. Clearly, from what had transpired between the plaintiff and DW1 and later confirmed by DW4's letter in AB33–34, I have to dismiss the suggestion that the dates stipulated in the agreement are tentative.

> Of course, this is counsel's suggestion because nowhere in the evidence led by the plaintiff (except a denial by PW1 that time is of the essence) that these dates are 'mere markings of a few tentative dates' for completion of the various stages of the works. Therefore, from the evidence and the surrounding circumstances of the case, I am satisfied that the time of completion specified in AB32 and 34 is of the essence of the contract.

As the judge has found that the intention of the parties was that time was of the essence of the contract, the law which now applies in this case is s 56(1) of the Contracts Act 1950. Section 56(1) reads:

> When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Section 56(1) only applies to cases where the parties to the contract have intended that time is of the essence of the contract. In the present case, since the plaintiff (contractor) had failed to complete on time, and time having been found to be of the essence of the contract by the judge below, the contract became voidable at the option of the defendant (employer). See Pollock & Mulla, *Indian Contract and Specific Relief Acts* (11th Ed, 1994), Vol 1 at p 694, where it reads:

> The use of the word 'voidable' is immaterial. Whenever one party to a contract has the option of annulling it, the contract is voidable; and when he makes use of that option the agreement becomes void.

Under sub-s (1), exercising the option means to annul the contract so as to make it as though it has never been entered into, in which case, had the defendant exercised the option, the agreement would become void and the defendant would only be entitled to restitution (restitutio in integrum) under ss 65 and 66 of the Contracts Act 1950 (*Loke Yuen Cheng & Anor v Vimtex Sdn Bhd* [1998] 4 MLJ 169 at pp 174, 176 and 177). The defendant would not be entitled to claim damages from the plaintiff for breach of contract once the option in s 56(1) had been exercised. This is because by the exercise of the option, the contract no longer exists and there cannot be a breach of a non-existent contract.

The building contract in the present case has four completion dates, thus:

(i)	Completion for access culverts, gates and fencing	31 August 1980
(ii)	Completion for factory roof and floor	30 September 1980
(iii)	Completion for store area roof and crane structure	31 October 1980
(iv)	Total completion of contract including office blocks and ancillary building water tanks, water connection and electricity supply	30 November 1980

A The date for the total completion of the entire project was 30 November 1980. Nevertheless, on 6 January 1981, the plaintiff and the defendant had agreed that completion (presumably, the final completion date) was extended to 31 January 1981. Since time has been found to have been the essence of the contract by the court below, the extension of the period from 30 November 1980 to a new fixed date, namely B 31 January 1981, would on the authorities have preserved the position that time was still of the essence without a fresh stipulation to that effect (*Loke Yuen Cheng & Anor v Vimtex Sdn Bhd, Luck v White* (1973) 26 P & CR 89 at p 95 by Goulding J and *Siah Kwee Mow & Anor v Kulim Rubber Plantations Ltd* [1979] 2 MLJ 190). 'Indeed, the mere extension of the C period to a new fixed date would on the authorities have preserved the position that time was of the essence, without fresh stipulation to that effect' said Goulding J in *Luck v White* at p 95. See also *Buckland & Ors v Farmer & Moody* [1978] 3 All ER 929 at p 937 where Buckley LJ said:

> ... If a vendor has once made time of the essence of the contract and then allows a further extension to a fixed date the time remains essential.

D And in *Barclay v Messenger* (1874) 43 LJ Ch 449 at p 456, Jessel MR said:

> It appears to me plain that a mere extension of time, and nothing more, is only a waiver to the extent of substituting the extended time for the original time, and not an utter destruction of the essential character of the time.

E So that, as in this case, the extension granted to the plaintiff to complete by 31 January 1981 was an extension to a new fixed date which would have preserved the position that time was still of the essence, without fresh stipulation to that effect.

Inactivity on the part of the defendant between 30 November 1980 to F 6 January 1981 (when the defendant agreed to extend the completion date to 31 January 1981) was for so short a duration of time that it was insufficient of itself to make time cease to be of the essence of the contract (*Loke Yuen Cheng & Anor v Vimtex Sdn Bhd* [1998] 4 MLJ 169 at p 178). See also Buckley LJ in *Buckland & Ors v Farmer & Moody* [1978] 3 All ER 929, at p 937:

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> It is conceded by the plaintiffs that inactivity on the part of a vendor, who has made time of the essence of the contract, for a reasonable period, would not make time cease to be of the essence of the contract. The length of the time which elapsed here was not, in my opinion, sufficient of itself to deprive time of its character of being essential.

H And Goff LJ at p 942:

> Mere standing by is not enough at all events unless it continues for an unreasonably long time, and there is no suggestion of that in this case.

In this kind of situation, s 56(3) applies. It reads:

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> If, in a case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of the promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise

at the time agreed, unless, at the time of the acceptance, he gives notice to the promisor of his intention to do so. A

See Pollock & Mulla, *Indian Contract and Specific Relief Acts* (11th Ed, 1994), Vol 1 at p 589 (on the Indian s 55 which is similar to our s 56(3)):

A claim for compensation under this section would be barred if the promisee accepts performance after the stipulated time unless he had given notice to the promisor of his intention to claim compensation at the time of the delayed acceptance. B

In such an event, by the application of sub-s (3), damages could not be claimed by the defendant for any loss occasioned by the non-performance of the promise to complete at the time agreed, which was 30 November 1980. This is because by sub-s (3), the defendant 'cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed' unless, at the time when the defendant agreed to allow the extension of the then completion date (which was then 30 November 1980) to the new fixed date of 31 January 1981, the defendant gave notice to the plaintiff of its intention to claim compensation. On 6 January 1981 (when the defendant agreed to extend the completion date to 31 January 1981), the defendant did not give notice to the plaintiff of its intention to claim compensation. C D

But, despite the extension to 31 January 1981, the plaintiff still failed to complete on time. On 25 March 1981, the architect of the defendant wrote to the plaintiff threatening to rescind the contract unless the construction work was restarted within 24 hours. The letter states: E

Re: Notice of intention to determine contract for the proposed factory & office on part of Plot 254 & 255, Prai Industrial Area, Butterworth for Naga Tembaga Sdn Bhd. F

With reference to the above, we have been instructed by our client to hereby serve notice on you of their intention to determine the above contract between you and our client Naga Tembaga Sdn Bhd.

Please take note that unless you start work on the septic tank and office block and other works within 24 hours upon received (sic) of this letter.

We have strict instruction to proceed with the determination of your contract. G

Notwithstanding the threat, the plaintiff was still allowed to continue to work on the project until it was finally completed on 24 September 1981.

In a case where time is of the essence of the contract, if the party who is in the right allows the time fixed for completion to pass and allows the defaulting party to try to remedy his default (in the present case the plaintiff was even allowed to complete the project), then time is no longer to be regarded as of the essence of the contract (*Loke Yuen Cheng v Vimtex Sdn Bhd*, at p 178). See *Luck v White* (1973) 26 P & CR 89 at p 95 where Goulding J said: H I

The notice to complete expired early in September. The vendors did not then, as they had threatened, either rescind the contract or resell the property.

> Instead they continued to discuss the possibilities of completion and ultimately agreed to November 16. It would have been easy for the vendors to reserve their rights in express terms. They might, for example, have extended the period for compliance with the notice to a specified date, time to be of the essence in that regard. Indeed, the mere extension of the period to a new fixed date would on the authorities have preserved the position that time was of the essence, without fresh stipulation to that effect. The vendors, however, did nothing of the kind. They encouraged the purchaser to try to complete notwithstanding the expiry of the notice, and there was nothing to tell him [that is, the purchaser] at what moment the axe would fall.

And, the judge encapsulated the principle in this way, at p 96:

> If the party who is in the right allows the defaulting party to try to remedy his default after an essential date has passed, he cannot then call the bargain off without first warning the defaulting party by fixing a fresh limit, reasonable in the circumstances.

See also Goff LJ in *Buckland v Farmer & Moody*, at p 942:

> Waiver, however, is based on encouraging the purchaser to think that he will be given time indefinitely and will not be cut off without further notice.

In *Webb v Hughes* (1870) LR 10 Eq 281, Malins V-C said, at p 286:

> But if time be made the essence of the contract, that may be waived by the conduct of the purchaser; and if the time is once allowed to pass, and the parties go on negotiating for completion of the purchase, then time is no longer of the essence of the contract.

Since the defendant did not rescind the contract under s 56(1) of the Contracts Act 1950 when the plaintiff failed to complete on 31 January 1981 but instead had allowed the completion date to pass and had even allowed the plaintiff to remedy his default by permitting him to continue to work on the project until it was wholly completed, time was no longer to be regarded as of the essence of the contract. And when time is no longer of the essence of the contract, s 56(1) (which is only applicable to cases where the parties to the contract have intended that time is essential) no longer applies.

When time is no longer of the essence of the contract and no time for performance is specified, the promise must be performed within a reasonable time. Section 47 reads:

> Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

As to what is a reasonable time to have the contract performed is, in each particular case, a question of fact. But where one party has been guilty of unnecessary delay, the other may give him a notice fixing a reasonable time at the expiration of which he will treat the contract as at an end. The remedy at law for one party to call off the contract unilaterally in this way if he finds the other guilty of unnecessary delay has survived unscathed to the present day because equity would not assist the party who had been guilty of

impropriety (see *Jamshed Khodaram Irani v Burjori Dhunjibhai* (1915) 32 TLR 156 at p 157). In *Webb v Hughes*, Malins V-C said at p 286: A

> But if time be made the essence of the contract, that may be waived by the conduct of the purchaser; and if the time is once allowed to pass, and the parties go on negotiating for completion of the purchase, then time is no longer of the essence of the contract. But, on the other hand, it must be borne in mind that a purchaser is not bound to wait an indefinite time; and if he finds, while the negotiations are going on, that a long time will elapse before the contract can be completed, he may in a reasonable manner give notice to the vendor, and fix a period at which the business is to be terminated. But, having once gone on negotiating beyond the time fixed, he is bound not to give immediate notice of abandonment, but must give a reasonable notice of his intention to give up his contract if a title is not shown. B C

See also Pollock & Mulla, *Indian Contract and Specific Relief Acts* (11th Ed, 1994), Vol 1 at p 585:

> Either party's general right to have the contract performed within a reasonable time according to the circumstances is, of course, unaffected by the fact of time not being the essence; and in case of unnecessary delay by one party the other may give him notice fixing a reasonable time after the expiration of which he will treat the contract as at an end (*Stickney v Keeble & Anor* [1915] AC 386). D

In *Stickney v Keeble & Anor* [1915] AC 386, the headnote reads:

> Where in a contract for the sale of land the time fixed for completion is not made of the essence of the contract, but the vendor has been guilty of unnecessary delay, the purchaser may serve upon the vendor a notice limiting a time at the expiration of which he will treat the contract as at an end, ... E

Where no time for performance is specified, s 47 of the Contracts Act 1950 allows the promise to be performed within a reasonable time. But if there has been unnecessary delay by one party, the other may give him a notice fixing a reasonable time at the expiration of which he will treat the contract as at an end. Here, in the present case, the defendant did not give notice of its intention to give up the contract if the plaintiff still fails to complete at the time specified in the notice. F

Treating the contract as at an end or calling the contract off after giving notice fixing a reasonable time for the promisor to perform his part of the bargain is not the same as voiding the contract where the intention of the parties is that time is of the essence of the contract under s 56(1). In the case of the former, the person who gives the notice fixing a time at the expiration of which he will treat the contract as at an end has, of his own volition, made time essential, whereas in the latter case, time is essential because the parties have intended it to be so. G H

Ending the contract after the expiration of the notice giving the defaulting party a reasonable time to perform his part of the bargain (where no time for performance is specified as in s 47) would entitle the party who gave the notice to be relieved of the contract and to sue for breach of contract for non-performance and to claim damages under s 74, whereas avoiding the contract where the intention of the parties is that time is of the I

essence of the contract (under s 56(1)) would only entitle the party not at fault to claim restitution under ss 65 and 66.

In this country, s 56(1) requires a consensus of the parties to the contract to make time the essence of the contract. The subsection uses the words 'if the intention of the parties was that time should be of the essence of the contract'. Therefore, it is plain that in cases where s 56(1) applies, one party cannot unilaterally make time the essence of the contract. If time be not of the essence of the contract, one party could not of his own volition make it so unless there had been such improper conduct on the part of the other party (such as unnecessary delay where no time for performance is specified as in s 47) as to justify ending the contract if a notice fixing a reasonable time be not complied with. See Harman J in *Smith v Hamilton* [1951] Ch 174 at p 181:

> If time be not of the essence of the contract initially, it follows, in my judgment, that one party cannot, of his own motion, make it so; to say that by writing a letter one party can make time of the essence when it was not so before, may be a convenient but is an inaccurate way of putting it. That has been pointed out on many occasions, and amongst others by Fry J in *Green v Sevin* (1879) 13 Ch D 589 at p 599. Fry J said:
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> > 'What right then had one party to limit a particular time within which an act was to be done by the other? It appears to me that he had no right so to do, unless there had been such delay on the part of the other contracting party as to render it fair that, if steps were not immediately taken to complete, the person giving the notice should be relieved from his contract. It has been argued that there is a right in either party to a contract by notice so to engraft time as to make it of the essence of the contract where it has not originally been of the essence, independently of delay on the part of him to whom the notice is given. In my view there is no such right. It is plain upon principle, as it appears to me, that there can be no such right. That which is not of the essence of the original contract is not to be made so by the volition of one of the parties, unless the other has done something which gives a right to the other to make it so. You cannot make a new contract at the will of one of the contracting parties. There must have been such improper conduct on the part of the other as to justify the rescission of the contract sub modo, that is, if a reasonable notice be not complied with. That this is the law appears to me abundantly plain.'
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> Since, then, time not being of the essence, the vendor could not, of his own volition, make it so unless there had been some impropriety on the part of the purchaser.

In order to understand that there is a subtle but important distinction between the two situations, I need to return to first principles. At common law, the time fixed by the parties for completion has always been regarded as essential with the result that the common law courts have always held the parties to their bargain as to time, so that, if a party fails to complete on the appointed time, the other party can treat the contract as at an end. But courts of equity which have a concurrent jurisdiction with courts of law did not look at time as being essential as courts of law did. They held on to the maxim that 'in equity time is not of the essence of the contract'. They would

only allow a departure from the maxim to cases in which the parties have stipulated that the time fixed is to be essential. This is how it was put by Lord Parker of Waddington in *Stickney v Keeble & Anor*, at pp 415 and 416:

> My Lords, in a contract for the sale and purchase of real estate, the time fixed by the parties for completion has at law always been regarded as essential. In other words, courts of law have always held the parties to their bargain in this respect, with the result that if the vendor is unable to make a title by the day fixed for completion, the purchaser can treat the contract as at an end and recover his deposit with interest and the costs of investigating the title.
>
> In such cases, however, equity having a concurrent jurisdiction did not look upon the stipulation as to time in precisely the same light. Where it could do so without injustice to the contracting parties it decreed specific performance notwithstanding failure to observe the time fixed by the contract for completion, and as an incident of specific performance relieved the party in default by restraining proceedings at law based on such failure.
>
> This is really all that is meant by and involved in the maxim that in equity the time fixed for completion is not the essence of the contract, but this maxim never had any application to cases in which the stipulation as to time could not be disregarded without injustice to the parties, when, for example, the parties, for reasons best known to themselves, had stipulated that the time fixed should be essential, or where there was something in the nature of the property or the surrounding circumstances which would render it inequitable to treat it as a non-essential term of the contract.

What it means is this — in the view of equity, if time is intended by the parties to be of the essence of the contract, then there must be a stipulation to that effect in the contract, otherwise in equity, the time fixed for completion is not the essence of the contract. In this country, the principle is embodied in s 56(1) of the Contracts Act 1950. In order to make time of the essence of the contract, the parties to the contract must have intended it to be so. That is why it has been held that one party cannot on his own unilaterally make time essential. But, if time for performance or completion is not specified and there had been unnecessary delay by the other party, time can be made essential by the party who was not at fault if a reasonable notice fixing a time to end the contract is not complied with. This appears to be an exception to the maxim 'in equity time is not of the essence of the contract'. The remedy at law for one party to end the contract unilaterally in this way for impropriety on the part of the defaulting party was not interfered with by courts of equity and the reason for this can be found in the judgment of Lord Haldane (in delivering the judgment of the Judicial Committee of the Privy Council) in *Jamshed Khodaram Irani v Burjori Dhunjibhai* (1915) 32 TLR 156 at p 157:

> But equity would not assist where there had been undue delay on the part of one party to the contract and the other had given him reasonable notice that he must complete within a definite time. Nor would it exercise its jurisdiction when the character of the property or when other circumstances would render such exercise likely to result in injustice. In such cases, the circumstances themselves, apart from any question of expressed intention, excluded the jurisdiction.

In such a situation, equity would not interfere with the remedy at law. The defaulting party had no equity to restrain proceedings at law to enforce the stipulation as to time. See also judgment by Lord Parker of Waddington in *Stickney v Keeble & Anor* [1915] AC 386 at p 416:

> It should be observed, too, that it was only for the purposes of granting specific performance that equity in this class of case interfered with the remedy at law. A vendor who had put it out of his own power to complete the contract, or had by his conduct lost the right to specific performance, had no equity to restrain proceedings at law based on the non-observance of the stipulation as to time.

Therefore, since time was no longer of the essence of the contract by the defendant's waiver of it by allowing time to pass, the contract could no longer be avoided under s 56(1). However, since the plaintiff now had a reasonable time (s 47) to complete the project, compensation could not be awarded for delay. This is because there could not be any delay as the plaintiff had a reasonable time to complete and in fact, was allowed to complete the project.

But if, on the other hand, the judge below had found that it was not the intention of the parties that time should be of the essence of the contract, the defendant would be entitled to compensation from the plaintiff for the loss caused by the delay for not completing the project on time (s 56(2)). Subsection (2) of s 56 reads:

> If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do the thing at or before the specific time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by the failure.

Compensation would then be payable under s 56(2) for any loss occasioned to the defendant by the plaintiff's failure to perform his promise to complete the project on the date specified. As things stood in the present case, however, that was not the stand taken by the defendant. The defendant took the position that time was of the essence of the contract and, as it turned out in the court below, the judge did, indeed, find in favour of the defendant's contention that time was essential in the contract. That, however, proved to be the defendant's undoing because the consequences that follow from a finding that time was essential in the present case (as I have endeavoured to show in this judgment) have resulted in the defendant losing his claim for damages.

22 October 1998

Abdul Malek Ahmad JCA: In Penang High Court Civil Suit No 776 of 1983, the plaintiff, who is the appellant in Civil Appeal No P–02–56–96 ('the first appeal') and the respondent in Civil Appeal No P–02–708–96 ('the second appeal'), had sued the defendant, who is the respondent in the first appeal and the appellant in the second appeal, for RM356,833.54 with interest. The parties had entered into an agreement on 26 July 1980 for the construction of an office and a factory on Lot No 254 and Lot No 255, Jalan

Perusahaan in the Prai Industrial Estate for the agreed contract price of RM1,040,000. For the purposes of this judgment, which is for both the appeals, we shall refer to the parties as the plaintiff and the defendant respectively.

In addition, the plaintiff had also pleaded in its statement of claim that it had carried out additional works based on various variation orders at the defendant's request, the value of which was RM67,337.96, although apparently this has not been actually included in the prayers. This apparent omission is explained later in the judgment through the concession by learned counsel for the plaintiff that this amount is in fact part of the amount claimed.

The defendant disputes the claim insisting that it had paid the plaintiff RM750,504.42 and in any case, it was its contention that the plaintiff was not entitled to the principal amount claimed as it had failed to complete the construction of the office and factory premises within the stipulated time.

With regard to the additional claim for RM67,337.96, this amount is not agreed to by the defendant as it is of the opinion that it should only be for RM62,608.98. The defendant has also counterclaimed for RM594,308.45 as ascertained liquidated damages and RM618,986.28 as loss of interest on project investment and loss of income from investment by virtue of the plaintiff's delay in completing the works only after the specified contractual dates.

In their statement of defence, the defendant contends that the plaintiff's tender for the construction of the said office and factory was awarded to the plaintiff upon the terms of a memorandum in writing dated 20 July 1980 signed by both parties and upon the terms and conditions in the letter of acceptance dated 26 July 1980 and confirmed by the plaintiff on 28 July 1980.

The defendant also maintains that the plaintiff undertook to execute all the works comprised in the tender documents upon the terms that payment for all works including extras or deductions for omissions would only be made upon the architect's certification that the said works had been performed and completed to their satisfaction and in accordance with the different time schedules stipulated for the satisfactory completion of the works.

The time schedules have been divided into the following four categories:

(a)	for the access culverts, gates and fencing	by 31 August 1980;
(b)	for the factory roof and floor	by 30 September 1980;
(c)	for the store area roof floor and crane structure; and	by 31 October 1980;
(d)	for the total completion of contract including office blocks and ancillary building, water tanks, water connection and electricity supply.	by 30 November 1980.

A It is the averment of the defendant that the works were not completed on the specified dates and the plaintiff was liable to pay the RM594,308.45 certified by the architect as liquidated damages which the defendant is entitled to deduct or set off from or counterclaim against the plaintiff's claim. The actual completion date was 24 September 1981. As for the minor variation works ordered by the defendant, it says that these were B measured and valued on 28 May 1982 at RM62,608.98.

It was also agreed in the letter of acceptance that the plaintiff will pay the defendant RM2,000 as agreed penalty for every one day late during which the works or any part thereof remain unfinished and conversely, the defendant will pay the plaintiff a bonus of RM500 for every one day early if C completed before the actual completion date.

The particulars of liquidated damages as stated in the defendant's counterclaim are as follows:

(a) access culverts, gates and fencing were not completed until 27 December 1980 — a delay of 91 days —

D $\frac{24{,}104.50 + 25{,}600 \times 2{,}000 \times 91}{1{,}040{,}000}$ = RM8,698.27

(b) factory roof and floor were not completed until 26 December 1980 — a delay of 61 days —

E $\frac{306{,}343.90 \times 2{,}000 \times 61}{1{,}040{,}000}$ = RM35,936.40

(c) factory store area roof and floor were not completed until 16 December 1980 — a delay of 30 days —

F $\frac{306{,}343.90 \times 2{,}000 \times 30}{1{,}040{,}000}$ = RM17,673.69

(d) total completion of contract including office blocks and ancillary building, water tanks, water connection and electricity supply were not completed until

G 24 September 1981 — a delay of 298 days —

298 days x 2,000	=	RM596,000.00
Total:		RM658,308.45
Less: 29 raining days and three days festive season (32 days x 2,000)	=	RM 64,000.00
Total:		RM594,308.45

H

I It may be pertinent to point out that for the details in paras (a), (b) and (c), the number of days had been calculated from the date that particular category of work ought to have been completed up to 30 November 1980, the agreed completion date of the whole contract, and not the actual

completion dates which in all these cases are different dates in December 1980, whereas for the details in para (d), time begins to run from 30 November 1980, the agreed completion date, up to 24 September 1981 when the works were actually completed.

As for the counterclaim of RM618,986.28, the particulars are set out below:

(a)	loss of interest on project investment of RM6,000,000 at the rate of 11% pa for 266 days	—	RM480,986.28
(b)	loss of income from investment estimated at the rate of RM10,000 per month for nine months and 24 days	—	RM98,000.00
(c)	storage charges for machineries ordered at RM20,000 per month for two months	—	RM40,000.00
	Total:		RM618,986.28

The plaintiff in its defence to the counterclaim states that the requisite planning permission was only obtained by the defendant sometime in early September 1980 and as such, the plaintiff was not able to commence work before planning permission was granted. As for the stipulated time schedules, it insists that they were mere stipulations and not conditions. Time, therefore, was not of the essence of the contract. However, even if time was of the essence, which it denies, the fact that the defendant allowed the completion dates to pass meant that it had acquiesced in the work continuing under the contract and had, therefore, waived compliance with the original dates and is now estopped from relying on the time schedules.

The plaintiff had also listed out in its reply and defence to the counterclaim, the particulars of the defendant's interference, omissions and defaults:

(i) the first plan for the septic tank submitted to the Majlis Perbandaran Seberang Perai was rejected and the new plan was only approved sometime in mid March 1981 and the plaintiff could not commence with his work until the completion of the septic tank;

(ii) the subsidence of the septic tank constructed required shoring up and this further caused a delay of one week in the plaintiff's work;

(iii) the subsidence of the office floor necessitated shoring up and reinforcement and thereby caused the plaintiff to delay its work;

(v) the plaintiff's workers were diverted to carry out work for one Goh Seng Kee who was employed by the defendant to construct the factory floor;

(v) the approval of the plan by the Majlis Perbandaran Seberang Perai for the support structure for the water tank was delayed;

(vi) the piling and foundation works for the buildings to be constructed by the plaintiff was undertaken by the defendant's own servants and agents and such piling and foundation works were delayed and the plaintiff was only handed possession of the building site sometime in the middle of or in late September 1980; and

(vii) the plaintiff was also required to purchase the building materials for the construction of the factory and office buildings from the defendant who from time to time was late in the delivery of such building materials to the plaintiff.

The defendant had also requested the plaintiff to do additional works apart from those originally agreed upon, namely the construction of the precast reinforced box culverts, the construction of additional air ventilation holes, the reconstruction of flooring for the office building which had subsided and the change of roofing materials to enable the better penetration of sunlight.

As for the RM2,000 per day, the plaintiff argues that the agreed penalty is unreasonable, harsh, unconscionable and of no effect. As for the defendant's claim for loss and damage, the plaintiff maintains they are not recoverable in view of s 75 of the Contracts Act 1950 ('the Act') which states that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract, reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for. It is, of course, the plaintiff's contention that there had been no breach on its part.

On 22 December 1995, the learned trial judge gave judgment for the plaintiff but also allowed part of the defendant's counterclaim. This has resulted in the two appeals before us. The first appeal was filed by the plaintiff on 17 January 1996 and the second appeal was filed by the defendant on 15 November 1996 after leave to appeal out of time was granted by this court on 12 November 1996.

The trial, which was heard on various dates over a period of six years, commenced on 18 July 1988 and was completed on 2 June 1994. In his judgment dated 22 December 1995 running to 67 pages, the major part of it dealing quite in detail with the testimony of each and every witness called, the learned trial judge had stated at p 50 as follows:

> Thus, after going over the pleadings and the detailed notes of evidence and after careful deliberation of the written submissions of both counsel, my approach to the case was to ask the following questions:
>
> (1) Is the plaintiff entitled to the balance of the contract works in the sum of RM356,833.54 with interest and for RM67,337.96 being the value of additional works?
>
> (2) Have the defendants proved, on a balance of probabilities, the allegations in para 6 of the defence, that the plaintiff delayed in the completion of the

four stages of the works within the time stipulated in the agreement, AB31–32? A

(3) Arising from (2), whether the dates of completion of the works in AB32 constitute the essence of the contract?

(4) Are the defendants entitled to payment of RM618,986.28 for damage and loss of the use of the said factory due to non-completion of the factory within the stipulated time? B

Then at pp 53 and 54, he said:

> From the evidence, I find on a balance of probabilities that the delay in the completion of the works was caused entirely by the plaintiff. I find the defendants through DW1, DW3, DW4 and DW5, supported by the correspondences, have given satisfactory explanations on the cause of the delay. I accept them as truthful witnesses. PW1, on the other hand, was evasive. In my view, the plaintiff's delay was attributed to his inexperience in undertaking a big contract of this nature, shoddy workmanship, inadequate workforce, and last but not least, his impecuniosity. C

The next question that he had dealt with was whether the completion dates as stipulated in AB32 and AB34 are of the essence of the contract. The learned trial judge's conclusion on this point, having weighed the issues, was that from the evidence and the surrounding circumstances of the case, he was satisfied that the times of completion specified in AB32 and AB34 are of the essence of the contract. He had said: D E

> From the authorities, it is quite clear to me that whether or not time is of the essence of the agreement depends on the facts and circumstances of each case. Intention of the parties gathered from the instrument itself together with the surrounding circumstances must be looked at (*Associated Pan Malaysia Cement Sdn Bhd v Syarikat Teknikal & Kejuruteraan Sdn Bhd* [1990] 3 MLJ 287). F

Then at pp 55 and 56, he stated:

> Therefore, from the evidence and the surrounding circumstances of the case, I am satisfied that the time of completion specified in AB32 and 34 is of the essence of the contract. G

In the defence to the counterclaim, the plaintiff pleads that even though time is of the essence of the contract, which is denied, nonetheless, the defendant allowed the completion dates to pass and acquiesced in the works continuing under the agreement. The learned trial judge commented on this at pp 56 and 57 as follows: H

> On this issue, counsel for the plaintiff seems to rely on the conduct of the defendants with particular emphasis on a letter dated 10 February 1981 written by DW4 to the plaintiff ('AB50') whereby the defendants had agreed to grant the plaintiff an extension of time to complete the building works to 31 January 1981. The question here is: does this constitute a waiver of the provision that time is of the essence under the agreement AB31–32 and the plaintiff is entitled to be given reasonable time? From the said letter AB50, it seems to me that when the architects visited the site on 31 January 1981, they found the plaintiff's progress of work very slow and had fallen very far behind I

despite the extended date of completion of 31 January 1981. But, this does not mean that the defendants have waived the provision that time is the essence of the contract.

At p 57 of the judgment, the learned trial judge opined:

> There is a distinction between a waiver and an extension of time which is not a waiver. In the present case, the plaintiff, despite several warnings, even threatening him, had considerably delayed in his performance of the works. The defendants had to tolerate him. As explained by DW1, if they terminated the agreement, they would incur more time, the plaintiff would have to move out from site and a new contractor would take over. Works would be suspended. The consequences would affect the success of defendants' project and to the great advantage of their competitors. Based on the evidence, in my judgment, the granting of an extension of time given by DW4 to the plaintiff in AB50 does not amount to a waiver of the entire completion dates of the works in AB32 and 34.

He had gone on to say that:

> In the words of Jessel MR in *Barclay v Messenger* (1874) 43 LJ Ch 449, the effect of an extension of time under a contract making time of the essence is that 'a mere extension of time, and nothing more, is only a waiver to the extent of substituting the extended time for the original time and not the utter destruction of the essential character of the time. See also *Siah Kwee Mow & Anor v Kulim Rubber Plantations Ltd* [1979] 2 MLJ 190 where Abdoolcader J (as he then was) adopted the above principle. In that case, the learned judge held that by an extension of the completion date by a period of one month to a fixed date, time was not waived and did not become at large but remained at all times still of the essence and therefore there was no question that the plaintiffs were entitled, as they claimed, to be given reasonable time to complete the purchase of the estate.

As for the plaintiff pleading in its statement of claim that the value for the additional works carried out on the direction of the defendant's architect was RM67,337.96, the defendant admitted that the plaintiff had carried out the extra works except that for the quantum, the value of the works as at 28 May 1982 was RM62,608.98 and not the amount pleaded by the plaintiff. On this point, the learned trial judge accepted the defendant's calculation at AB72.

The learned trial judge at p 59 of his judgment concluded:

> In my judgment, based on the above findings, my answers to questions (1), (2) and (3) are as follows. The plaintiff succeeds in his claim for the balance of RM356,833.54 for works done under the agreement. He is also entitled to the sum of RM62,608.98 for the extra works. However, since he is the sole cause of the delay in completing the works within the completion dates under the said agreement, where time is of the essence of the agreement, I hold that the plaintiff is liable to pay to the defendants liquidated damages in the agreed sum of RM2,000 per day for the period of the delay as certified by the architect.

The plaintiff argues that the defendant is not entitled to base its loss at RM2,000 per day because this was tantamount to imposing a penalty which is prohibited by the law of contract. In *Dunlop Pneumatic Tyre Co Ltd v New*

Garage and Motor Co Ltd [1915] AC 79, it was held that the question whether a sum stipulated is a penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach. It was also held that assuming that the stipulated sum applied to all the preceding stipulations in the agreement, then it was liquidated damages.

At pp 61 and 62 of his judgment, the learned trial judge had this to say:

> On the facts of this case, I find no difficulty in concluding that the sum of RM2,000 per day for the delay is a genuine pre-estimate of damage and not a penalty. The plaintiff agreed to the liquidated damage clause when he signed the agreement AB31–32. Later, he was explained to by both DW1 and DW4 not only about the liquidated damage of RM2,000 per day in the event of delay of completion of the works, but also the incentive bonus of RM500 per day for early completion. I also find the sum of RM2,000 to be reasonable, having regard to the total investment put up by the defendants and their financial commitments in building their factory.
>
> Accordingly, the defendants succeed in their claim for liquidated damages as pleaded in para 15 of the defence and counterclaim. I do not, however, agree with their computation of the liquidated amount of RM594,308.45 as per 'Particulars of liquidated damages'. I find that the defendants have not taken into account the fact that despite the delays committed by the plaintiff, the latter is still entitled to be paid the balance of the contract price in the sum of RM356,833.54 and this amount was never deducted from their calculation of RM594,308.45 as liquidated damages. In addition, they must also deduct RM62,608.98 being the amount due to the plaintiff for extra works. To simplify the matter, I now direct both parties to go before the registrar of the High Court and obtain the necessary appointment under O 37 of the RHC for the assessment of damage based on the correct number of days of delay. It follows that after the determination of the correct amount, the defendants shall be entitled to deduct the said sum from the amount due to the plaintiff from the defendants by way of set-off.

As regards the defendant's claim for the sum of RM618,986.28 being damages for loss of interest on project investment and loss of income on investment, the basis is that because of the plaintiff's delay in the completion of the works, the defendant suffered loss of interest on project investment of RM6m calculated at the rate of 11% pa and loss of income from investment estimated at the rate of RM10,000 per month.

On this point, the learned trial judge posed the following two questions:

(1) Are the defendants entitled to claim for this head of damage in addition to their claim for liquidated damages?

(2) If they can claim, have they proved their damage?

For the first question, the learned trial judge, in relying upon *Malaysia Rubber Development Corp Bhd v Glove Seal Sdn Bhd* [1994] 3 MLJ 569 where the Supreme Court held that the plaintiff who was claiming for marketing costs in incurring expenses for marketing its products was entitled to claim

for such amount as it could prove to be clearly attributable to the defendant's breach of the agreement, held that in the instant case, he would agree with learned counsel for the defendant that it is entitled to claim for the losses prayed for in para 15 of the defence and counterclaim.

As to the question whether the defendant has proved its loss, the learned trial judge said that the law is clear that the burden of proving both the facts and the amount of damages lies on the person seeking damages before he can recover them, citing *Bonham-Carter v Hyde Park Hotel Ltd* 64 TLR 177 and *Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360.

For the loss of income from investment, the learned trial judge found DW1's evidence quite scanty and too simplistic, more or less suggesting that the figures best known to DW1 were conjured up by him to arrive at the estimated loss of RM10,000 per month.

On the claim for loss of interest at the rate of 11% pa on the project investment of RM6m, the learned trial judge stated that although he accepted the interest rate as reasonable in the circumstances, the computation of the project investment amount appears to be devoid of proof. The defendant had simply put in the company's balance sheet without calling the accountant or maker to explain the basis of the financial statements therein. He also found that the storage claim had not been paid for.

The learned trial judge concluded that the loss had not been proved sufficiently by the defendant. Thus, when the damage is shown but the amount is not proved, the court will usually award nominal damages. He accordingly gave judgment for RM10 as nominal damages for the loss of interest on project investment and loss of income on investment.

Interest was awarded at 6% pa from 1 June 1981 until the date of judgment and at 8% pa thereafter until realization. Each party was ordered to pay its own costs.

Before us, learned counsel for the plaintiff pointed out that the learned trial judge had wrongly duplicated the variation amount as that had already been included in the amount claimed. In our view, the additional amount for the variation works had actually not been prayed for in the statement of claim and the learned trial judge should have just easily disregarded it. The oversight by the learned trial judge, however, must be attributed to the fact that the plaintiff had pleaded the variation amount of RM67,337.96 separately in the statement of claim.

Learned counsel for the plaintiff added that there were four completion dates and in consequence, no damages should be awarded as the relevant clause of the contract had became inoperative because the result of acts by the defendant prevented the plaintiff from completing the works on the specified dates.

Learned counsel reiterated that the learned trial judge's conclusion was not supported by the evidence. The relevant contract was entered into on 28 July 1980. For the first completion date on 31 August 1980, it was not

possible for the plaintiff to complete as the defendant had delayed in getting the relevant approval. The drawings were only submitted on 26 August 1980 and the piling was completed on 9 October 1980. The building plans were approved on 12 September 1980.

Learned counsel argued that time was not of the essence of the contract in these circumstances and the plaintiff need not complete the work on the specified dates. Otherwise, the defendant should void the contract under s 56 of the Act which deals with the effect of failure to perform at a fixed time in a contract in which time is essential.

He reiterated that the question of liquidated damages does not arise and a reasonable time period should be taken thereafter to assess damages. But no reasonable time had been fixed in this instance.

Learned counsel for the defendant submitted that the learned trial judge had concluded that time was of the essence based on the letters from the architect to the plaintiff dated 10 February 1981 and 25 March 1981 respectively and the letter from the plaintiff to the architect dated 17 July 1981.

She added that the learned trial judge had found that the plaintiff was the one who caused the delay and that the completion dates are of the essence of the contract. He also ruled that the granting of time by the defendant was neither an acquiescence nor a waiver.

Being aware that the learned trial judge had decided that time was of the essence, we hold that if time is of the essence, then sub-s (1) of s 56 of the Act applies.

That subsection states:

> When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

However, since the defendant did not rescind the contract under that subsection, time was no longer of the essence and was at large. This gave the plaintiff a reasonable time to complete the works. Therefore, damages should not be awarded for the delay in line with sub-s (3) of s 56 of the Act which reads:

> If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of the promise at any time other than agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of the acceptance, he gives notice to the promisor of his intention to do so.

As for the first appeal which is the plaintiff's appeal against the award for liquidated damages in the defendant's counterclaim and the cross-appeal by the defendant on the award of nominal damages, we were somewhat confused by the decision of the learned trial judge. On one hand, he ruled that it was the plaintiff who had caused the delay and that time was of the

essence of the contract. Yet, he gave judgment for the plaintiff subject to the set off of the liquidated damages certified by the architect and sought for in the counterclaim which he ordered to be assessed by the learned senior assistant registrar as he was not happy with the computation. We would have thought that in those circumstances, he would have dismissed the plaintiff's claim altogether.

We know that the learned trial judge was wrong in reaching this conclusion because if time is of the essence and there is no rescission under sub-s (1) of s 56 of the Act, sub-s (3) of that section applies, that is, there will be no compensation. Compensation is payable for the delay when time is not of the essence although time is specified as provided for in sub-s (2) of s 56 of the Act as follows:

> If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do the thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by the failure.

In view of sub-s (1) of s 56 of the Act, we could not agree with the learned trial judge that time was still of the essence as by allowing the plaintiff to complete the whole project as late as 10 months later on 24 September 1981, unlike the cited cases where the extended period was much shorter, the defendant cannot be heard to say that time was of the essence when it did not rescind the contract on one of the four completion dates. Thus, in line with sub-s (3) of s 56 of the Act, the defendant cannot claim compensation for any loss occasioned by the delay unless notice to do so had been given.

Accordingly, we allowed the first appeal with costs and set aside the High Court's order on all damages on the counterclaim. As for the defendant's cross-appeal on the award of nominal damages amounting to RM10, we dismissed it for the same reasons and also because we agree with the reasons put forward by the learned trial judge earlier in this judgment. The deposit was refunded to the plaintiff.

Pertaining to the second appeal by the defendant, its learned counsel argued that the judgment should only be for the amount claimed and not together with the variation amount which was not claimed. The actual amount claimed was RM356,833.54 but this includes the variation amount totalling RM67,337.96. The learned trial judge, however, has accepted the defendant's calculation of the variation amount at RM62,608.98. In view of the difference, the amount claimed is now RM352,104.56.

Quite correctly, learned counsel for the plaintiff conceded before us that the trial judge was wrong in granting the order for the additional variation amount and that the judgment should only be for the amount claimed. Consequently, by consent, we allowed the second appeal by reducing the judgment sum to RM352,104.56. For the record, this figure also tallies if we deduct RM750,540.42, which has been paid by the defendant, from the agreed contract price of RM1,040,000 and add the variation amount of RM62,608.98. We directed that there should be no order as to costs and refunded the deposit to the defendant.

10 November 1998

Mokhtar Sidin JCA: I have the advantage of reading the written judgments of both NH Chan and Abdul Malek Ahmad JJCA and I concur with them.

First appeal allowed. Cross-appeal on nominal damages dismissed. Second appeal allowed.

Reported by David Lai